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8 **UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON**

9 THE ESTATE OF CINDY LOU HILL, by  
10 and through its personal representative,  
11 Joseph A. Grube; and CYNTHIA  
12 METSKER,  
13 individually,

14 Plaintiffs,

15 vs.

16 NAPHCARE INC., an Alabama  
17 corporation; HANNAH GUBITZ,  
18 individually; and SPOKANE COUNTY, a  
19 political subdivision of the State of  
20 Washington.

21 Defendants.

**NO. 2:20-cv-00410-MKD**

**DEFENDANT SPOKANE  
COUNTY'S MOTIONS IN LIMINE  
AND MEMORANDUM IN  
SUPPORT**

**NOTE FOR CONSIDERATION:**

**Tuesday, June 28, 2022**

22 **I. MOTION**

23 COMES NOW Defendant Spokane County, by and through its attorney of record, and  
24 moves the Court for an Order in Limine, precluding any evidence or testimony, opinions,  
25 comments, argument, statements or questions by counsel, any witnesses, parties, directly or  
26 indirectly or by inference, on the topics or items of evidence set forth below. This motion is  
made pursuant to *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986) and FRE  
104.

**DEFENDANT SPOKANE COUNTY'S MOTIONS  
IN LIMINE AND MEMORANDUM IN  
SUPPORT- 1  
Cause No.: 2:20-cv-00410-MKD**

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1 Spokane County further moves that the requested Order contain a direction to plaintiffs'  
2 counsel to inform the plaintiffs, and all witnesses called by plaintiffs of the prohibition against  
3 testimony on these subjects.

4 The following memorandum is respectfully submitted for the Court's consideration in  
5 ruling on the defendants' Motion in Limine.  
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## 7 **II. LAW AND ARGUMENT**

8 The defendants seek to exclude the admission of the following evidence, including any  
9 reference thereto by the Plaintiffs:

### 10 **A. Argument, testimony or comment which invites the jurors to conceptually** 11 **put themselves in the place of the plaintiff in considering any of the issues -**

12 This argument, commonly known as the "golden rule argument," has been explained as:

13 essentially a suggestion to the jury by an attorney that the jurors should do unto  
14 others, normally the attorney's client, as they would have others do unto them.  
15 The typical situation in which such an argument has been employed is the  
16 personal injury case in which the plaintiff's counsel suggests to the jurors that  
17 they grant the plaintiff the same amount of damages they would want or expect  
if they were in the plaintiff's shoes. The courts have generally found the 'Golden  
Rule' argument improper because a jury which has put itself in the shoes of one  
of the parties is no longer an impartial jury.

18 68 ALR Fed. 333.

19 A jury is instructed as to its duty to be impartial and not let sympathy or prejudice  
20 influence its determination in rendering a proper verdict. Testimony or argument suggesting  
21 that the jury consider how they would feel if they were in the plaintiff's position, or otherwise  
22 seeking particular empathy toward the plaintiff, is inconsistent with the duty of each respective  
23 juror and the jury as a whole. An objection after such a comment or argument has been offered  
24 is not as effective and a motion in limine from the Court.  
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1 Thus, Spokane County requests an order in limine preventing the plaintiffs from arguing  
2 or testifying that the jurors should place themselves in the plaintiffs' position in considering  
3 any aspect of this case.

4 **B. References to Liability Insurance or Indemnification.**

5 FRE 411 prohibits the admissibility of evidence that a person was or was not insured  
6 against liability on the issue of whether a person was negligent. The fact that the Spokane  
7 County is or is not insured against this claim should be excluded. Any suggestion that the  
8 jury's award, if any, will be paid by an insurer is similarly inadmissible under ER 411.

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10 **C. All non-party witnesses should be excluded from the courtroom during trial.**

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12 Fed. R. Evid. 615 states that: "[a]t a party's request, the court must order witnesses  
13 excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its  
14 own." Defendants request such an order, which does not include a party or a designated  
15 representative of a party. *Id.*, (a) and (b).

16 **D. Evidence of settlement negotiations.**

17 Fed. R. Evid 408 excludes evidence of settlement negotiations and any such evidence  
18 should be excluded in this case.

19  
20 **E. Relative Financial Condition of the Parties.**

21 Any reference to the financial resources available to the defendant versus the resources  
22 of the plaintiff in litigating this case should be excluded as irrelevant and designed to appeal to  
23 the passion or prejudice of the jury.

1 **F. Evidence or theories not previously disclosed by plaintiff in discovery or**  
2 **properly supplemented pursuant to FRCP 26.**

3 Any evidence not disclosed in response to proper discovery requests should be excluded.  
4 Parties have an affirmative duty to answer discovery in a timely fashion and to supplement  
5 discovery when different or additional information becomes known. Local Civil Rule 26(e).  
6 This rule is intended to prevent a party from hiding facts in discovery and then using them at  
7 trial to the surprise of the opposing party. Any evidence that was required to be produced, but  
8 wasn't should be excluded. FRCP 37(c).

9 **G. That the defendants have not called to testify as a witness any person**  
10 **equally available to both parties.**

11 There is no purpose to plaintiffs suggesting the defendants should have called any  
12 particular witness, but did not, except to suggest to the jury some improper motive of the  
13 defendant. Such a suggestion is not evidentiary in nature and is thus inadmissible. FRE 402.

14 **H. Arguments and inferences outside the record for "political" effect.**

15 Defendants' counsel has previously encountered arguments outside the evidence  
16 designed to, or having the effect of, inflaming the jury to bring in a verdict for political impact.  
17 For example, an argument about claimed negligence of public employees which focuses not on  
18 whether such negligence existed or was causative of the plaintiff's claimed injuries, but instead  
19 suggests that a large verdict will "send a message" to "government". In this case, there is no  
20 request for injunctive relief. Thus no reason to suggest that the jury make any "statement" to  
21 the government.  
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23 Such improper arguments are not susceptible of correction by remedial instruction after  
24 the fact to the jury. Defendants requests an order in limine precluding plaintiffs' counsel from  
25 inferring or arguing for a political result not consonant with the instructions of the Court.  
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1 **I. Testimony from any witness not properly disclosed pursuant to Civil Rule**  
2 **26.**

3 Parties have an affirmative duty under CR 26(a)(1) and (e) to disclose the identity of  
4 witnesses, including their address and phone number and the subjects of their known  
5 information. *See Tribble v. Evangelides*, No. 10–3262, 670 F.3d 753, 760 (7<sup>th</sup> Cir. 2012)  
6 (“Under Rule 37(c)(1) ‘exclusion of non-disclosed evidence is automatic and mandatory ...  
7 unless non-disclosure was justified or harmless.’ ” (*quoting Musser v. Gentiva Health Servs.*,  
8 356 F.3d 751, 758 (7<sup>th</sup> Cir.2004))).

9 **J. Post-Incident Actions.**

10 The plaintiffs have questioned witnesses regarding post-incident matters, including  
11 whether internal reviews occurred or whether policy or practice changes were made as a result  
12 of the incident. Such evidence is not relevant to any claim in the case. First, FRE 407 makes  
13 post incident measures “that would have made an earlier injury or harm less likely to occur”  
14 inadmissible to prove culpable conduct. Thus, any subsequent changes to policy or practice  
15 should not be admitted for that purpose.

16 Finally, even if plaintiffs’ argue that some relevance exists, any probative value is  
17 substantially outweighed by unfair prejudice and confusing the issues. FRE 403. The plaintiffs  
18 should be prohibited from eliciting testimony regarding actions taken, or not taken, by the  
19 Spokane County following the incident in this case.

20 **K. Prior or Subsequent Jail Deaths.**

21 Spokane County moves to exclude any evidence of other Jail deaths that are factually  
22 unrelated to this subject incident, including past or subsequent complaints, prior use of force,  
23 or disciplinary actions or reports. Spokane County also request that the Court specifically  
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1 prohibit plaintiffs' counsel from questioning any witness about such acts, whether prior or  
2 subsequent to the subject incident. Such evidence or testimony would be inadmissible  
3 pursuant to F.R.E. Rules 404(b) and 403. *See also, Duran v. City of Maywood*, 221 F.3d 1127,  
4 1132-1133 (9th Cir. 2000); and *Bibo-Rodriguez*, 922 F.2d 1398, 1400(9th Cir. 1991.)

5 **L. The court should require 24 hours notice of witnesses, deposition**  
6 **testimony, and exhibits prior to presentation at trial.**

7 The court should require all parties to provide at least 24 hours of advanced notice to all  
8 other parties regarding the identity of any and all witnesses they intend to call. Such an order  
9 facilitates a prompt and orderly presentation of the case and expedites the trial. Moreover, it  
10 will allow all parties time to make any appropriate objections to the testimony, deposition  
11 testimony, or exhibit outside the presence of the jury and to prepare for anticipated testimony.  
12 Such an order will benefit all parties equally and contribute to the day-to-day efficiency of trial.

13 **M. Any argument or evidence that the parties have filed motions in limine.**

14 Evidence or reference to motions in limine in front of the jury should be excluded as  
15 irrelevant and prejudicial. Fed. R. Evid. 402; Fed. R. Evid. 403.

16 **N. Plaintiffs' Exhibit 12.**

17 Exhibit 12 is a report prepared by an outside medical professional, Dr. Steven  
18 Hammond, following the death of Ms. Hill, in order to comply with Jail policy requiring such  
19 outside expert reviews.

20 Dr. Hammond's report should be excluded as hearsay under Fed. R. Evid. (FRE) 801. It  
21 is an out of court statement being offered into evidence for the truth of the matter asserted.  
22 FRE 801(c). *See, e.g., Durham v. Cnty. of Maui*, 804 F.Supp. 1068, 1070 (D. Haw. 2011)  
23 ("Expert reports are generally inadmissible as hearsay but may be admissible as one of the  
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1 exceptions to hearsay.”). Here, there is no apparent exception to the hearsay rule and the  
2 Hammond report is therefore inadmissible.

3 **O. Plaintiffs’ Exhibit 17.**

4 Exhibit 17 is an animation produced by the plaintiffs on May 2, 2022, after the  
5 completion of discovery. Plaintiffs have provided no explanation of who created it or who or  
6 what provided the necessary foundation for what it depicts. While animations can be  
7 introduced at trial, as illustrative exhibits, “[a]t a minimum, the animation's proponent must  
8 show the computer simulation fairly and accurately depicts what it represents, whether the  
9 computer expert who prepared it or some other witness who is qualified to so testify, and the  
10 opposing party must be afforded an opportunity for cross-examination.” *See Friend v. Time*  
11 *Mfg. Co.*, No. 03-343-TUC-CKJ, 2006 WL 2135807, at \*20 (D. Ariz. July 28, 2006) (citing  
12 *Byrd v. Guess*, 137 F.3d 1126 (9th Cir. 1998)).

13 Animations that are misleading are properly exclude pursuant to FRE 402 (relevance)  
14 403 (misleading the jury and undue prejudice). *See, e.g., Robinson v. Missouri Pacific*  
15 *Railroad Co.*, 16 F.3d 1083, 1088 (10th Cir.1994) (observing that, under Rule 403, “trial judges  
16 should carefully and meticulously examine proposed animation evidence for proper  
17 foundation, relevancy, and the potential for undue prejudice.”).

18 In this case, plaintiffs have been advised that the animation is objectionable because it is  
19 inaccurate and misleading. Aspects of the illustration are not supported by the medical  
20 examiner’s report, such as the animation’s depiction of the supposed spread of bacteria to  
21 other organs including the brain. Plaintiffs have the burden of establishing the foundation for  
22 the animation before it can be shown to the jury. Given the fact that it was produced after the  
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1 discovery deadline and unaccompanied by any apparent foundational support, it should be  
2 excluded.

3 **P. Plaintiffs' Should Not Be Permitted to Call Michael Sparber.**

4 Mr. Sparber is the former Director of the Spokane County Jail. He was the Director at  
5 the time of Ms. Hill's death. There is no claim or evidence that he was personally involved in  
6 any way with the care or custody of Ms. Hill. Any evidence that Mr. Sparber has would  
7 therefore be second hand. Furthermore, this Court has entered a default judgment against  
8 Spokane County on the issue of liability, and thus it is not apparent what relevant testimony  
9 Mr. Sparber would be asked to provide on the remaining issues of liability of NaphCare and  
10 Nurse Gubitza or the damages claim.

12 To the extent plaintiffs' intend to ask Mr. Sparber questions that relate to liability  
13 against Spokane County, his testimony would be irrelevant and inadmissible under FRE 402.  
14 It would also be inadmissible under FRE 403 because it would confuse the issues, mislead the  
15 jury and waste time. Finally, to the extent Mr. Sparber is asked questions about NaphCare's  
16 liability it would be inadmissible under FRE 403 as cumulative of the testimony of Don  
17 Hooper, the current interim director at the Jail and the Lieutenant at the time of Ms. Hill's  
18 custody and the designated 30(b)(6) witness for the County throughout discovery. In fact,  
19 plaintiffs' disclosure of trial witnesses makes it clear that both witnesses would be called to  
20 testify on the identical subject matter:  
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22 8. Donald Hooper, Lieutenant, Spokane County Jail. Plaintiffs *may call Mr.*  
23 *Hooper to testify about Spokane County's contract with NaphCare, Inc. and Spokane*  
24 *County Jail's policies and practices, including the "medical watch" practice, as well as*  
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1 **CERTIFICATE OF FILING & SERVICE**

2 I certify under penalty of perjury under the laws of the United States of America and the  
3 State of Washington that on the date specified below, I electronically filed the foregoing with  
4 the Clerk of the Court using the CM/ECF system which constitutes service on the following  
5 under LCivR 5(b):

6 ***Counsel for Plaintiffs***

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24 DATED this 26<sup>th</sup> day of May, 2022, at Tumwater, WA.

25 /s/ Tam Truong

26  
\_\_\_\_\_  
Tam Truong  
Assistant to John E. Justice